

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1084

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X

UNITED STATES OF AMERICA,

Docket No: 77-1084

Plaintiff-Appellee,

-against-

RAFAEL CUADROS,

Defendant-Appellant.

----- X

DEFENDANT-APPELLANT'S APPENDIX

1082



FREDRIC LEWIS
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PAGINATION AS IN ORIGINAL COPY

APPENDIX TABLE OF CONTENTS

	<u>Page</u>
1. Index to Record on Appeal	A1
2. Docket Sheet	B1-B3
3. Indictment	C1-C2
4. Bill of Particulars	D1-D3
5. Supplemental Bill of Particulars	E1-2
6. Affidavit of Assistant United States Attorney Bentley in Compliance with Direction of the Court	F1-F3
7. Charge to the Jury.	G1-G163
8. Pre-trial motions and affidavit of Fredric Lewis in support thereof	H1-6

INDEX TO THE RECORD ON APPEAL

Documents

Certified copy of the docket sheet	A-C
Certified copy of Indictment and superseding Indictment	1
Notice of appearance	2
Docket entry sheet and forms A & B, criminal complaint, disposition sheet, appearance bond, notice of appearance, Magistrate temporary commitment	3
Govt's notice of readiness for trial	4
Deft's notice of motion and affirmation	5
Govt's affidavit in opposition to motion of Deft.	6
Govt's requests to charge	7
Govt's Bill of Particulars	8
Deft's notice of appeal from judgment	9
Judgment and commitment order	10
Financial affidavit (CJA 23) of deft	11
Clerk's Certificate	12

IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(a)	(b)	(c)	(d)
Filed the following papers received from Mag. Martenstine (Mag. # 75-1848) Docket Entry Sheet & forms A & B. Criminal Complaint, S.D.N.Y. Disposition Sheet Appearance Bond in the sum of \$10,000 secured by \$1,000 cash, Co-signed by Silvana Cuadros Notice of Appearance - Fredric Lewis, 377 B'way., N.Y.C. 10013 Magistrate's Temporary Commitment				431-5933
Filed Memo. End. on motion dtd. 1-14-76 for discovery & inspection Brady Material, bill of particulars to dismiss the indict. The within motion is withdrawn (see affdvt. of Fredric Lewis Esq. dtd. 2-26-76. KSo Ordered.....Cooper J. (mailed notice)				
Filed Gov'ts Notice of Readiness for trial on or after 6/14/76.				
Filed superseding indictment retaining same number relating to 75 Cr 1254 Assigned to Judge Cooper as per Speedy Trial Act.				
RAFAEL CUADROS - Court directs a Not Guilty Plea be entered for all Three Dfts. Case Adj. to 9/9/76.....Werker J.				
Filed Dfts. Notice of Motion for order dismissing, suppressing & directing U.S. Atty. to serve upon dfts. counsel copies of Grand Jury minutes, etc. Ret. 10-20-76.				
Filed Gov'ts Affdvt in opposition to dfts. motion for relief of various kinds.				
Filed Gov'ts Memorandum of Law in opposition to dfts. motions to suppress the narcotics seized on 12/16/75.				
Filed Gov'ts Requests to charge.				
Filed Gov'ts Bill of Particulars.				
Filed Memorandum Order. Dft. motions Denied in its entirety as to Suppression of the narcotics, Grand Jury minutes, etc. Cooper J. (mn)				
Filed Govts Requests for the Voir Dire.				
Filed Govts. Trial Memorandum.				
Filed Govts. KSupplemental Bill of Particulars.				
Trial begun as to dft. Cuadros with a jury before Cooper J. Trial Cont'd " " " " " " " " Jury verdict: Dft. Cuadros Not Guilty on Ct. 1, & Guilty on Ct. 2 - Jury Polled. Dft. Remanded.....Cooper J.				
Filed Govts. Affdvt. in compliance with court direction, of 12/13/76.				

(Cont'd)

LETTER CODES
For Identifying
Periods of Exclud-
able Delay Per 18
U.S.C. 3161(h)

A. Examination or
hearing for
mental or
physical in-
capacity (18
U.S.C. 4244)

B. NARA Examina-
tion (28
U.S.C. 2502)

C. State or Federal
trials on other
charges.

D. Interlocutory
Appeals.

E. Hearings on
pretrial motions

F. Transfers from
other districts
(per P.R.C.P.
Rules 20, 21
& 40)

G. Defendant's
motion is actually
under advisement. Period of
up to 30 days
is excludable
per
3161(h)(1)(G)

H. Miscellaneous
Proceedings
Probation or
Parole revoca-
tion, Deposition,
Extradition

I. Prosecution
delayed by
mutual agreement

M. Unavailability
of defendant
or witness

N. Period of
incompetence
of defendant to
stand trial.

O. Period of
NARA Commit-
ment or
Treatment.

P. Superseding
indictment
and/or new
charges.

R. Defendant
awaiting trial
of Co-defen-
dant when no
severance has
been granted.

T. Continuances
Granted per
3161(h)(8)
(i.e. ends of
justice or com-
plexity of case
outweighs de-
fendants' in-
terests).

U. Time between
guilty plea and
plea with-
drawal.

V. Time while
moving prisoner
from state insti-
tutions per
transfer/ de-
tainer pro-
cedure.

W. Grand
Jury Deliberation
Time (per
3161)

Y. Any delay ex-
cluded by court
order for reasons
not included
in 3161

(a) (b) (c) (d)
Interval Start Date Ltr Total
Days

CIVIL DOCKET

DATE	FILINGS—PROCEEDINGS	Judge Cooper	AMOUNT REPORTED IN ENCLOSURE RETURNS
	Page #3		
1-20-77	Filed Govts. Memorandum of Law in opposition to dfts. motion to set aside the Jury's Verdict on Ct.2.		
1-25-77	Filed Dfts. Notice of Appeal from Judgment dtd. 1-20-77.(mailed notice)		
1-26-77	Filed Financial Affdvt. CJA 23.		
1-20-77	Filed Judgment & Commitment (Atty. Freddie Lewis Present) (Sylvina Cuadros present & acted as interpreter) The Dft. is hereby committed to the custody of the atty. gen. or his authorized representative for imprisonment for a period of FOUR (4) YEARS. The dft. is place on Special Parole for a period of THREE(3) YEARS, pur. to Title 21 U.S.Code Sec. 841, to commence upon expiration of confinement.....Cooper J. (as to the S-76 Cr.1254 Indictment). Issued Commitment 1-27-77.		
1-20-77	Original Indictment dismissed...Cooper J.		
2-2-77	Filed True Copy of J&G with marshals ret. Dft.delivered to Warden,MCC,NY on 1-20-77.		
2-1-77	Filed Notice of Certification to the USCA.		
5-9-77	Filed Transcript of testimony of [illegible] dated 12/28, 9, 10, 13, 1976		
5-9-77	Filed Transcript of testimony of [illegible] dated 12/6/76		
5-9-77	Filed Transcript of testimony of [illegible] dated 1/26/77		
5-9-77	Filed Notice of Certification of 1st Supplemental Record to the USCA.		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-v- :

JAIME VALDES and
RAFAEL CUADROS, :

Defendants. :

INDICTMENT

75 Cr. 1254

1254

-----X
COUNT ONE

The Grand Jury charges:

1. From on or about the 16th day of October, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JAIME VALDES and RAFAEL CUADROS, the defendants, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and their co-conspirators, unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Section 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

C-1

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

1. On or about December, 16, 1975, defendant JAIME VALDES went to the vicinity of East 74th Street and Second Avenue, New York, New York;
2. On or about December 16, 1975, defendant RAFAEL CUADROS went to the vicinity of East 74th Street and Second Avenue, New York, New York;
3. On or about December 16, 1975, defendant JAIME VALDES entered an automobile parked in the vicinity of East 74th Street and Second Avenue, New York, New York, in which automobile was present defendant RAPHAEL CUADROS.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 16th day of December, 1975, in the Southern District of New York, JAIME VALDES and RAPHAEL CUADROS, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately one pound of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

FOREMAN

THOMAS J. CAHILL
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

F.L.

UNITED STATES OF AMERICA :

- v - :

BILL OF PARTICULARS

RAFAEL CUADROS, :

75 Cr. 1254 (IBC)

Defendant. :

S I R :

For its bill of particulars, the United States of America hereby states the following:

(a) Each of the defendants is alleged, in Count One, to have conspired to violate the Federal narcotics laws. Each of the defendants is alleged, in Count Two, to have distributed or possessed with intent to distribute approximately one pound of cocaine, or to have aided and abetted another in doing so. The particular acts and declarations which constitute proof of these offenses are set forth, in part, in documents previously furnished to the defense.

(b) Count One: From on or about October 16, 1975 to on or about August 26, 1976, in and around New York, New York, Queens, New York, and elsewhere.

Count Two: The one pound of cocaine was possessed with intent to distribute in New York, New York, Queens, New York (including the vicinity of Queens Boulevard and 48th Street), and the vicinity of 300 East 74th Street, New York, New York, from prior to December 16, 1975 to the evening of December 16, 1975.

So
conf
on
12/16/75

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(c) See (b), supra, as well as the documents previously furnished to the defense.

(d) Cuadros and Valdes: December 16, 1975, at approximately 9:15 p.m., at the intersection of East 74th Street and First Avenue, New York, New York.

Prikas: March 18, 1976, at approximately 7:10 p.m., in Queens, New York.

(e) To be supplied via supplementary bill of particulars.

(f) One .38 Calibre nickle-plated Colt Cobra revolver, Serial No. F69341 and six live "super .s8 special" rounds was seized from a car in which Valdes and Cuadros were riding upon their arrest on December 16, 1975.

(i) The defendants were seeking to sell one pound of cocaine to another man; details are set forth in the documents previously furnished.

(j) The one pound of cocaine which was in the possession of Cuadros and Valdes when they were arrested was found to contain 88.4% cocaine hydrochloride; an additional quantity furnished by the defendants for testing purposes in connection with the transaction herein was found to contain 86.0% cocaine hydrochloride. Official reports on the chemical analysis of the narcotics, identified as Exhibits 1 and 2, have previously been furnished to the defense.

(1) See the particulars already supplied in response to items "b", "c", "d" and "i" herein.

(m) The cocaine was contained in two clear plastic bags, one inside the other, sealed at the top with a rubber band, which were contained within a brown paper bag bearing no marks or labels, which was contained within a plastic "Regal Shoes" shopping bag. The shopping bag also contained a number of shirts.

(n) All three defendants.

Dated: New York, New York

November 3, 1976

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

By: Allen R. Bentley
ALLEN R. BENTLEY
Assistant United States Attorney

TO:
FREDERIC LEWIS, ESQ.
30 Vesey Street
New York, New York 10007

D3

AB:CTW
75-4128

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- :

RAFAEL CUADROS, :

Defendant. :

SUPPLEMENTAL BILL
OF PARTICULARS

75 Cr. 1254 (INC)

S I R :

For its supplemental bill of particulars, in response to item "e" of defendant's demand for a bill of particulars, the United States of America hereby states the following:

1. For a description of the narcotics and the weapon seized in this case, see items "f" and "j" of the Government's bill of particulars.

2. Additional property obtained from Cuadros at the time of his arrest is described as follows:

- a. One gray imitation leather bag;
- b. One red piece of paper with numbers and "Pedro" written on it;
- c. One white piece of paper bearing "Gottesman" and other writings;
- d. One New York City itinerant peddler's license, document number 689805;
- e. Econocar rental voucher No. 1367617 dated 11/28/75;
- f. Summons No. 026094-0 (re: 852QUH);
- g. One book containing names and phone numbers;
- h. Book of matches from El Inca Restaurant;
- i. Brochure for "Tahitia";
- j. Slip of paper with "669-6703" and '62-10 99 St. 2J" written on it;

Rec'd
12/6/75

E1

- k. Summons No. 53-655045-3 (re: 144 AUL);
- l. Summons No. 53-655044-2 (re: 144 AUL);
- m. Summons No. 53-655043-1 (re: 144 AUL);
- n. Summons No. 53-655042-0 (re: 144 AUL);
- o. Envelope addressed to "Title Bureau,
New York State Department of Motor Vehicles";
- p. Instruction manual for Sharp Electric
Calculator;
- q. Strauss Stores receipt dated 12/8/75 to
Cuadros for 2 tires;
- r. Business card from the ^eMason de Madrid
Restaurant;
- s. Piece of paper with "Jaime" and other
notations;
- t. Temporary insurance certification card and
New York State driver's license in the name of Fernandez;
- u. Summons No. 52-443695-2 (re: 852QUH);
- v. Summons No. 51-344281-2 (re: 852QUH);
- w. Summons No. 52-720804-3 (re: 852QUH);
- x. Summons No. 54-892378-2 (re: 852QUH).

Dated: New York, New York
December 3, 1976

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By:

ALLEN R. BENTLEY
Assistant United States Attorney

TO: FREDERIC LEWIS, ESQ.
30 Vesey Street
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

RAFAEL CUADROS,

Defendant.

AFFIDAVIT

75 Cr. 1254 (IBC)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

ALLEN R. BENTLEY, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York. As the Assistant United States Attorney assigned to the above case since September 24, 1976, I am fully familiar with the facts and circumstances herein. This affidavit is respectfully submitted in compliance with a direction of the Court, made on December 13, 1976, for a report on what evidence exists with respect to the issue of whether Cuadros' attorney, Fredric Lewis, was offered the opportunity to inspect the pouch that was received in evidence as Government's Exhibit 6 and its contents, 24 documents of a personal and business nature belonging to the defendant, in November 1976.

2. On December 23, 1976, I ^{reviewed} received the Cuadros file to determine whether documentation could be found with respect to the making of the inspection offer. Although it is still my best recollection that I told Mr. Lewis on the telephone that he could examine the documents in question in my office, no written record was found which would corroborate my recollection or enable me to pinpoint the date or time of the call.

F1

3. With respect to the issue of prejudice, which was addressed by the Court at trial, it is respectfully submitted that testimony adduced on the defendant's case, after the Court held that the Government was not precluded from offering the pouch (Government's Exhibit 6) and two of the items which it had contained (Government's Exhibits 6A and 6B), amply confirmed the Court's finding that Cuadros was not prejudiced by the lateness of the Government's supplemental bill of particulars. Both Cuadros and his wife acknowledged that Cuadros was a vendor of jewelry; if anything, admission of Government's Exhibit 6A, a peddler's license issued to Cuadros by the New York City Department of Consumer Affairs, buttressed Cuadros' defense that he was gainfully employed and would not stoop to selling cocaine. Cuadros admitted on the stand that Government's Exhibit 6, the pouch, belonged to him; Government's Exhibits 6A and 6B (a wholly innocuous receipt for tires bought by Cuadros) were offered only to establish that fact. Thus Cuadros cannot claim that he was surprised by the introduction of items which he did not own or did not know the Government would claim were his, or that he was ^edeprived of an opportunity to prove that the items belonged to someone else. Moreover, the primary significance of Government's Exhibits 6, 6A and 6B to the Government's case arose from the fact that the items were found in the console of the Valdes car, next to Government's Exhibit 7, the revolver. Since Cuadros' demand for a bill of particulars did not seek the location where the items were found -- assuming, arguendo, that such information could have been obtained pursuant to a properly-drawn bill of par-

* Item "e" of the demand reads as follows:

"(e) The property of every nature and description taken from each of the defendants or from persons originally arrested with the defendants pursuant to their arrest".

particulars -- Cuadros could not have been prejudiced by the Government's failure to provide its supplemental bill of particulars before December 3, 1976.

Allen R. Bunting

ALLEN R. BENTLEY
Assistant United States Attorney

Sworn to before me this
27th day of December, 1976.

JAMES H. HARRIS, Chairman
 National Council on the Status of Women
 1000 Pennsylvania Avenue, N.W.
 Washington, D.C. 20004
 Committee on the Status of Women
 Congress, 99th Congress, 1st Sess. 1987

F 3

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CHARGE OF THE COURT

. Cuadros 3

(Cooper, J.)

Cr. 1254

12/9/76 4

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THE COURT: Mr. Foreman, ladies and gentlemen of the jury: I would be sadly remiss if I failed at the very outset of the Court's charge to the jury to express to each one of you the keen satisfaction that has come to me, and to counsel I am sure, for the undivided attention that you have constantly demonstrated since you took your oath.

It is evident that you have discharged your duty with fidelity. You have followed the testimony with intelligent understanding and absorbing interest. I am quite satisfied that no single factual matter has escaped your attention.

You have been silent throughout and when your time comes to speak, I have every confidence, and I'm sure counsel on both sides join me in this, that in accordance with the solemnity of your oath and the high order of your conscience, you will pronounce the justice due in this case. Your selection was the result of great care exercised by Court and counsel. Your mission is not easy and we are sure you did not expect it to be.

A distinguished philosopher, Albert Camus, summed it up for all of us, for you, for the Judge and

2 for counsel, when he wrote that "Justice dies from the
3 moment it becomes a comfort, when it ceases to be a burning
4 reality, a demand upon one's self."

5 I repeat it. "Justice dies from the moment
6 it becomes a comfort, when it ceases to be a burning
7 reality, a demand upon one's self."

8 Let me say a word about objections that counsel
9 have interposed from time to time. Please understand that
10 counsel not only have the right but it is indeed their
11 duty on the offer of certain evidence to press whatever
12 legal objections there may be to its admission. With those
13 comments from counsel, we take leave of them and concern
14 ourselves exclusively with the parties involved in this
15 controversy. We are concerned with the Government on one
16 side representing the community, and on the other side the
17 defendant. We are not concerned with counsel on either
18 side. We are concerned with the litigants in this litigation.
19

20 This is not a contest in salesmanship, it
21 isn't a battle of wits, it isn't a clash of personalities.
22 It is by law pronounced to be a conscientious search for
23 the truth. If you expected, in a criminal case in
24 particular, that there would be a movie of every move and
25 a voice recording of every voice, we wouldn't need any jury.

Human beings being human beings and judges of the facts as you are must concentrate on the behavior of people under a given set of circumstances. No conspiracy is reduced to writing, no speeches are made with regard to it. In fact, comments even by the participants are generally few and far between.

And so your mission is a conscientious search for the truth and if you can leave this courthouse with the firm conviction that your verdict is consistent with the truth, then indeed your duty will have been done because the only triumph in any litigated case, whether it is civil or criminal, is the triumph of the truth. Not the triumph of the lawyers or the triumph of the Judge.

As I told you when you were being selected, every defendant, every defendant regardless of his race, creed, color, age, regardless of impediments of any kind, is entitled to a fair trial under our law, and the very same legal propositions of law must be charged by the Court to the jury regardless of the defendant involved, whether the defendant is successful or waiting for success, whether he is ignorant or well-informed, crude or polished, highly esteemed or despised, whether he is a member of a good family or a bad family; yes, even the avowed enemy, each is entitled to his day in court and let justice be

done in each case according to the facts in each case and according to the law in each case. And that is what America stands for.

You do not sit here as barons of old who assembled by whim, favor or caprice, by likes or dislikes, decided who was going to be flung into jail and who went free or who got the bag of gold or who was compelled to resign in abject poverty. You have no such power any more than I have. Your duty is to be the judges of the facts and apply the law to the facts no matter who likes it or who doesn't like it and let the chips fall where they may.

You are here to determine the guilt or innocence of this defendant before you and no one else.

I repeat, neither you nor I are here to please or favor anyone. We have a sworn duty to perform and we must discharge it if justice is to prevail. After all, it is your justice as much as mine, your courthouse as much as mine, for black, for white, for poor, for rich. It is your burden as much as my burden and you have to get excited about the doing of justice as much as I.

We have reached a point where you are soon to undertake your final function as jurors and here you perform one of the most sacred obligations and responsibilities. You are, make no mistake about it, ministers

1 of justice. You are to approach your duties in an attitude
2 of complete fairness, complete impartiality and to appraise
3 the evidence calmly and deliberately, and as was emphasized
4 by me when you were being selected, without the slightest
5 trace of sympathy, bias or prejudice for or against the
6 Government or the defendant who, I remind you, are the
7 only parties to this controversy.
8

9 What I have just said is as important a part
10 of this charge by the Court as any other part. Never
11 forget it for an instant, that you and you alone are the
12 sole and exclusive judges of the facts. And you are not
13 going to resolve them to oblige counsel and you are not
14 going to resolve them, as counsel for the defense intimated,
15 to please me. You will resolve them to please your con-
16 science and to uphold your oath. Without that, we have
17 no justice. We have a jungle.

18 In fact, I don't intend to touch on any of the
19 facts, and if I do, it will only be by way of example. I
20 don't tell everybody to rise when you come in and out be-
21 cause I want to invade the orbit of your function. I tell
22 them to rise because of the burden that you carry, and it
23 is not slight. It is as great as mine, every bit, if not
24 more.

25 I have been a fact-finder in my day, and still

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rdsbg

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am. There are many cases where the Judge sits without a

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jury. He is the jury, the judge, as well as the Judge of

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the law. Even in criminal cases. There are some cases

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some places throughout this country where a judge even

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sits without a jury in a murder case. The Judge is only

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concerned that justice shall prevail. Don't do any favors

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for anybody.

9

And so, since you are the exclusive judges of

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the facts, I have a right to say that its equivalent is

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found when it comes to law where the judge is the sole and

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exclusive judge of the law. You heard counsel press

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various legal points before me, and when I disagreed you

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heard me take a definite position whether they liked it

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or not. You do likewise as to the facts no matter who it

16

suits.

17

One of the things I have learned ever since

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I have been ten years of age, and I have frozen and I have

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gone hungry, I have lived on both sides of the tracks and

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I have seen the big and the mighty and the little and I

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have seen courage in the most unexpected places and I have

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seen cowardice by many who carry indicia of their academic

23

honors. I judge each person as that person comes before

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me on that person's merits, and you do likewise. And I

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have learned the lesson to be satisfied, as you must, with

the applause of your own conscience.

The fact that the Government is a party entitles it to no greater consideration than that accorded to any other party to the litigation. And by the same token, of course, it is entitled to no less consideration. Just think of that. That in America, the great United States of America, when it comes into a court of law in its own country, America says, you, Mr. Government, have no greater edge than the humblest litigant against you. That's the law. I can't be responsible for those who spit at it or those who don't know it. But the law is that the Government and the defendant start at the same starting point. In France or in England as soon as they get the case underway, civilized countries, the government is already on first base before one word has been said.

In America we don't ask a defendant, any defendant, to prove his innocence. We demand that the charge be proven beyond a reasonable doubt by the Government. That is the burden. That's what the Constitution stands for. You charge me with something? Now go in there and prove it and prove it beyond a reasonable doubt.

What's wrong with that standard? And that's all we are talking about. Nobody has dared in my presence to say a word otherwise. That's the law.

2 Don't blame me if I get incensed with people
3 who should know better, citizens of our country who
4 belittle our sense of justice and see nothing else to do
5 but to belittle and to smear and to **denounce**
6 and to defame and call into question the honor and the
7 decency and self-respect.

8 You will remember that guilt or innocence is
9 personal. This defendant and every defendant is entitled
10 to have his case determined from the evidence as to his
11 own acts, as to his own statements, as to his own conduct,
12 and any other evidence in the case which may be applicable
13 to him, the defendant.

14 Remember each count is a separate criminal
15 charge. And so today under our law when someone comes
16 into the Federal Court, unlike the old days, the law says
17 tell him what you are charging him with. Don't come back
18 next week with something else. What is it that you have
19 against him? State it. And so, in the same charge, you
20 can have as many as a hundred and more separate charges,
21 that the defendant stole on Monday and he stole on Tuesday
22 and he stole again on Wednesday, Thursday, Friday, Saturday,
23 Sunday. Seven distinct counts, all in one paper. One
24 indictment. One charge.

25 And so here this defendant is charged with two

1 rdsbg
2 separate crimes. Each one is a distinct crime and it is
3 your function on the evidence and on the law as I shall
4 give it to you to decide whether or not he is innocent or
5 guilty of either or both of the charges.

6 And you have to decide each of the charges on
7 the evidence with respect to that charge and on the law with
8 respect to that charge. Each charge must be separately
9 disposed of, separately determined on its facts and on
10 the law applicable to the facts.

11 The law says that jurors carefully selected
12 have the capacity to separate the totality of the evidence
13 and apply the evidence as you weigh it to this defendant.
14 We say, with great pride, and we mean it, that all parties,
15 Government and individuals alike, stand equal before the
16 bar of justice. Your final role is to decide the fact
17 issues that are in this case. You and only you, not the
18 lawyers and not the Judge, as I told you when you first
19 gathered before a word of testimony was given. I didn't
20 tell you you were here to please them or you were here to
21 please me. I told you then and I tell you now, you are
22 here to please nobody but your own conscience and what it
23 means to take an oath, as you did.

24 You have no more reason to put that aside than
25 I would have a reason to purposely avoid doing my duty

1 because I didn't like what I had to do, for which I could
2 be removed, and properly so, by the Senate of the United
3 States. Every Federal Judge in this country was appointed
4 by a President of the United States and confirmed by the
5 United States Senate or he wouldn't be here. He is here
6 for life. He doesn't have to cater to lawyers or care
7 what they think or what politicians have to say. The one
8 luxury is he has is his independence. Let them make the
9 money and gorge themselves with it, as is usually the case.
10 That's the be all and end all with a lot of people. We
11 don't buy it.
12

13 And so, ladies and gentlemen, you and you alone
14 pass on the weight of the evidence. You and no one but you
15 determine the believability or the credibility of each
16 witness. You and no one but you resolves such conflicts
17 as there may be in the testimony of witnesses, were they
18 innocent, were they purposeful, were they designedly? You
19 weigh each of them, the smoothies, the blunt ones, the
20 fellows that try to act as though they were as clean as
21 the driven snow. You study them. It is your estimate,
22 not mine and not the lawyers. You draw from the testimony
23 the reasonable inferences that are warranted, and you are
24 the only ones who can do that. And so it is for you, the
25 jury and the jury only, to make an independent, detached

assessment of the total evidence. I venture the suggestion that with all the sincerity in the world even the advocates on either side of the table cannot do so completely, for the interests of their respective clients are bound to rub off onto them, even subconsciously.

So you see why the law names you, the jury, and you alone, to pronounce the last word, so to speak, on what the total trial records point to as the guilt or innocence of this defendant on trial before you.

This may surprise you, but in the Federal Court the Federal Judge has a perfect right to comment on every word of the testimony. I have an idea that there was something to indicate that maybe that wasn't well-known. I can take every word of that testimony, I can direct that the transcript be given me of every witness and I could make comment on it and I may tell you I wouldn't believe that witness under a stack of Bibles from the floor to the ceiling if I wished to do it. Or with regard to another witness, I have the power to say he spoke the gospel truth. That's the power that resides in the Judge, so long as I add "But you don't have to abide by my estimate."

I have never done it and I never will because I refuse to believe that if a judge starts to pick out

2 pieces of evidence and comment on it, I refuse to believe
3 that there isn't one, and if the judge is persuasive,
4 pretty near everybody on the jury will adopt the judge's
5 conclusion on the facts. And that I wouldn't do. I
6 abhor the notion. That's your orbit and no one is going
7 to touch you on that. Any more than I would permit any-
8 body to interfere with what my conscience and my oath tell
9 me to do as a matter of law.

10 And so I won't do any such thing. I never
11 have. I don't believe I should praise you, do you honor,
12 speak of you as ministers of justice and then invade the
13 orbit of your function. To me that's like talking out of
14 both sides of one's mouth. That is your responsibility.
15 You are going to have to meet it and I have no doubt that
16 that's exactly what you will do. You will meet it.

17 Since I have the power to talk about the
18 evidence and even give you my evaluation of it, I forbid
19 you from reading into the tone of my voice or the emphasis
20 that I may apply here or there to a proposition of law how
21 the Judge feels about the facts. If I wanted to tell you,
22 I have a right to tell you right out, as I have already
23 told you. I have learned also since being on my own that
24 if you have something to say and you believe it, go up
25 the front way, Mister. Don't go sneaking around the back.

2 So if I want to tell you what my impression of certain
3 facts amounts to, I want to go up the right way, the front
4 way and I have a perfect right to do so. I am not going
5 to go sneaking around the back and indicate by tossing my
6 head or making gestures what I think about the facts.

7 Now, I am going to give you propositions of
8 law. Under your oath, and I reminded you of it before you
9 were sworn, under your oath you have to accept that law.
10 There was one of the jurors here, and I said what would
11 you do if you didn't like a proposition of law? I don't
12 know whether he is still on the jury or not, but you
13 remember, and his answer was right down the middle. If
14 I don't like it but if that's the law in the case, I have
15 to apply it.

16 So I am going to give you propositions of law
17 which you are duty-bound under your oath to apply, whether
18 you like the law or don't like the law. Because now you
19 are ministers of justice in this case under oath. If you
20 weren't, you could knock the daylights out of any laws you
21 wish, speak up and denounce it, which is what you are
22 Americans for. It's your right. But as a minister of
23 justice and sworn, you have no alternative. You have to
24 apply it. It will be otherwise unthinkable, just as it
25 would be unthinkable for me not to apply the law when I

1 know what the law is and for which, as I said before, a
2 judge could be removed. And it would be unthinkable if
3 a lawyer did it because if he did it, he could be disbarred.
4 Therefore, you have no special right to do it and get away
5 with it.
6

7 Before we consider each of the two charges
8 against this defendant and what is required to sustain
9 each charge, there are certain preliminary observations
10 that are in order, certain principles of law that are
11 applicable to every criminal case, and such is human nature
12 that people apply the term boilerplate to these fundamental
13 principles of law which have been hammered out by blood
14 and sweat and which are a part, a glorious part of our
15 country's judicial history. They are not boilerplate to
16 me. I have said them hundreds of times and on each
17 occasion I regard myself privileged to pronounce these
18 sacred propositions of law.

19 One of them is that an indictment is merely
20 an accusation, a charge. It is a method by which persons
21 accused by a grand jury of crimes are brought into court
22 and their guilt or innocence is determined by the trial
23 jury, such as you are. It is no evidence whatever of
24 guilt and you will not give any weight whatsoever to the
25 fact that an indictment has been returned against this

2 defendant.

3 This defendant here has pleaded not guilty.
4 He has a perfect right to plead not guilty and the Govern-
5 ment under our law has the burden of proving guilt beyond
6 a reasonable doubt, which I shall define for you shortly.
7 The Government has the burden, I repeat, of proving each
8 charge, each count against this defendant and proving each
9 count as to this defendant beyond a reasonable doubt.

10 Now, when I keep emphasizing, you are not to
11 gather from my voice that I believe the Government has
12 failed to do so or that the Government has succeeded.
13 I'm just emphasizing the propositions of law which are
14 sacred. I want you to understand them and I want you to
15 apply them.

16 After all, what does the word instruction mean?
17 The Judge should instruct the jury as to the law. Does it
18 mean to give you some phraseology and some legal terms
19 which fall on your ears for the first time and leave you
20 troubled and uncertain? It means teach the jury, convey
21 to the jury the essence, the substance, the purpose of
22 each proposition of law relative to this case.

23 Now, this burden cast upon the Government
24 under the law to prove a defendant guilty beyond a
25 reasonable doubt never shifts. It doesn't go from the

2 Government to the defendant, that the Government carries
3 the burden up to this point and then the defendant goes
4 forward from there. Not at all. The Government has at
5 all times the burden of proving the guilt of every defendant
6 charged and proving that guilt beyond a reasonable doubt.

7 The presumption of innocence, what does that
8 mean? There again is America with its depth of under-
9 standing. Every human being, no matter who it is, child,
10 grown-up, old man, whoever is charged with a crime, the
11 law says that that person so charged is presumed to be
12 innocent of the charge. And even as I am talking to you
13 now, so insistent is the law that this defendant is
14 presumed to be innocent of Count 1 and Count 2 while I am
15 talking to you. And it even carries on to the point where.
16 when you go to the jury room to deliberate, that presumption
17 of innocence, that shield that our law gives to every
18 accused, that shield protects him until you, the jury, are
19 satisfied beyond a reasonable doubt of his guilt. And then
20 that shield is pierced and it falls away from him and it
21 no longer protects him.

22 The presumption of innocence that I have been
23 talking about is sufficient to acquit a defendant of the
24 crime charged against him unless it is overcome by evidence
25 that satisfies your mind beyond a reasonable doubt of the

1 defendant's guilt, and unless you are so satisfied, it is
2 your sworn duty to find him not guilty. If, on the other
3 hand, you do not have a reasonable doubt as to guilt, it
4 is your sworn duty to find the defendant guilty.
5

6 Now, what are we talking about when we say
7 reasonable doubt? What does the law have in mind? What
8 does the law insist upon? If you will be patient with
9 me, you will see what reasonable doubt really amounts to,
10 and it won't surprise you.

11 How much evidence does the Government have to
12 place before a jury in any criminal case? Must it be
13 evidence beyond any possible doubt? Any possible doubt?
14 No. A thousand times no. The words are reasonable doubt
15 and they mean that there is a doubt founded in reason.
16 Not imaginary but founded in reason and arising out of the
17 nature of the evidence in the case or the lack of evidence
18 in the case. It means a doubt which a reasonable person
19 has after carefully weighing all the evidence. It means
20 a doubt that is substantial and not shadowy. Reasonable
21 doubt is a fair doubt, a doubt which appeals to your reason,
22 which appeals to your judgment, your common sense, your
23 understanding and arising from the state of the trial
24 record before you. Reasonable doubt is a doubt that would
25 cause a person to hesitate to act in matters of importance

in his own life.

A defendant is not to be convicted on suspicion. I told you that when you were being selected. He is not to be convicted on conjecture or even impressive evidence which did not rise to the dignity of significant persuasiveness.

Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant or a desire to uphold the Government. If after a careful and impartial consideration of all the evidence in the case, from start to finish, you can candidly and honestly say that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of a defendant's guilt which amounts to a moral certainty, then you have a reasonable doubt and in that circumstance, it is your duty to acquit.

On the other hand, if after such a fair and impartial consideration of the entire record, and what do we mean by that, the trial record? It means the testimony from the witness stand, the exhibits, the stipulations, everything that you heard and saw in this case, from start to finish. If on the basis of that entire trial record, and remember I warned you that you would have to pay

1 attention, before you were sworn as the jury in this case,
2 and I told you that the evidence would not fall as the
3 letters of an alphabet. I said there would be a little
4 piece here, a little fiber there and a big chunk somewhere
5 else. I told you you would have to gather all those
6 pieces and bits and fit them into a mosaic.
7

8 If after a fair and impartial consideration of
9 the entire trial record you can candidly and honestly say
10 that you are satisfied of the guilt of a defendant, that
11 you do have an abiding conviction of a defendant's guilt
12 which amounts to a moral certainty, I mean such conviction
13 or certainty as you would be willing to act upon in
14 important and weighty matters in your own personal affairs
15 in your own private lives, then you have no reasonable
16 doubt. And in that circumstance, it is your sworn duty
17 to convict.

18 One final word on this subject. A reasonable
19 doubt does not mean a positive certainty or beyond all
20 possible doubt. I told you that. Nothing can be proven
21 beyond a possible doubt except a mathematical formula.
22 We can take a series of figures and add them up and come
23 to a definite conclusion. That's establishing something
24 beyond all possible doubt. But when you are dealing with
25 flesh and bone and mind and heart and motives and intent,

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638

2 it would be almost impossible to prove anybody guilty if
3 the degree of proof was proof beyond all possible doubt.
4 And that is the reason why the law says that the degree
5 of proof is important, but don't make it impossible of
6 attainment. The burden is to prove a defendant guilty
7 and prove him guilty beyond a reasonable doubt.

8 Marshal, will you be good enough to take the
9 ladies and gentlemen of the jury and take them from this
10 place to the place that you have arranged where they are
11 to dine and bring them back within a reasonable period of
12 time which you can very well leave to their own sense of
13 what is right.

14 Thank you. Announce a recess.

15 (Recess.)

16 (In open court, jury present.)

17 THE COURT: Thank you, Marshal.

18 Let the record show that it was approximately
19 ten of seven when I turned the jury over to the marshal
20 and now it is approximately 8:20.

21 I want to discuss now with you what the indict-
22 ment contains and what it really means in simple language.
23 The indictment in this case contains two counts, as I have
24 repeatedly said. Two charges against this defendant
25 Cuadros.

Charge one, Count 1, what does that charge? That from on or about October 6, 1975, to on or about August 26, 1976, when the indictment in this case was filed, Cuadros conspired or planned or agreed with Jaime Valdes, Louis Prikas and others, to violate the Federal narcotics laws. That is, that they got together, they planned. What was the plan? In effect, let's violate the Federal narcotics laws. When you do that, even though you don't actually violate the Federal narcotics laws, in essence, that's a conspiracy. You have already gotten together, you have planned something, you have resolved to do something. You have agreed upon it. And what have you agreed upon? To do a lawful thing? No. To commit a crime. And when you commit the crime, that's a second crime. Conspiracy is one crime and doing it is another, as I shall attempt in my own limited fashion to develop.

What does Count 2 charge? Count 2 charges that on or about December 16, 1975, Cuadros distributed or possessed with intent to distribute approximately one pound of cocaine. He doesn't have to actually clutch it in his hand. When you have fifty people stealing and they got a big diamond, fifty of them can actually possess it in the eyes of the law even though physically it is in the hands of but one, depending on what took place.

I am just giving you some indication as I go along and when I get into the full significance of each act, I am going to saturate it. So always bear in mind the distinction. It is very important to remember at all times. Count 1 charges a conspiracy or a plan or an agreement between two or more persons to violate the Federal narcotics laws. It does not charge that they actually carried out the objectives of the conspiracy.

Remember then, that Count 1 only charges that they conspired to do so.

Count 2 charges that this defendant, Cuadros, and others actually carried out the conspiratorial plan or arrangement or agreement; that is, that the defendant and others possessed with intent to distribute, with intent to distribute -- that doesn't mean they actually did distribute, but they possessed it with an intent to distribute -- one pound of cocaine.

Am I getting through a little bit? Because I have to teach you this. You are not to hesitate to say no, Judge, I don't get it. Because this is the law you have to apply. If you don't understand, how can justice be done?

Now, let us turn to Count 1, the conspiracy charge. Let me read it to you. "From on or about the

2 10th day of October 1975, and continuously thereafter, up
3 to and including the date of the filing of this indictment,
4 in the Southern District of New York, Jaime Valdes, Louis
5 Prikas and Rafael Cuadros, the defendants, and others to
6 the grand jury known and unknown, unlawfully, intentionally
7 and knowingly combined, conspired, confederated and agreed
8 together and with each other to violate" such-and-such and
9 such-and-such of the United States Code, which is narcotics,
10 dealing with the unlawful distribution of narcotics. There
11 is the exact language of what is called a conspiracy.

12 And it goes on, this conspiracy charge, and
13 it reads, "It was part of said conspiracy that the said
14 defendants and their co-conspirators," so you see you have
15 three named, Valdes, Prikas, Cuadros and their co-conspira-
16 tors. That means other people, whose names were to the
17 grand jury unknown at the time. They charged it was a
18 part of said conspiracy that those defendants and their
19 co-conspirators unlawfully, intentionally and knowingly
20 would distribute and possess with intent to distribute
21 narcotic drugs.

22 Now, what does the statute read, the law of
23 the land on which this Count 1 is based? You can't charge
24 a person with a violation of law unless there is a law
25 that says you can't do thus-and-so. And this is what the

1 law says. I read it to you, the pertinent language. It
2 doesn't make any difference to you what it is called but
3 here it is. Title 21 United States Code Section 846. If
4 I flung that at you as a lot of people do, would you know
5 what I am talking about? It is a law enacted by Congress
6 which provides in part, "That any person who conspires to
7 commit any offense provided in the Federal narcotics laws
8 is guilty of a crime." There it is, simple language which
9 any kid can understand. It is based on that section of
10 the law that the charge against this defendant and others
11 was predicated.
12

13 In effect, the charge says you, sir, you and
14 you violated that particular section. You conspired,
15 et cetera.

16 Now, what does the Government have to prove
17 beyond a reasonable doubt with regard to conspiracy, the
18 conspiracy charged? Let me give you a side example. If
19 you want to make a loaf of bread, you must have certain
20 ingredients. You can't have it without the flour, the water,
21 the yeast, the eggs. All those things are ingredients,
22 and you have to have a certain quantity of them. Well, in
23 the law we say that every one of those elements must be
24 proven beyond a reasonable doubt. You can't just prove
25 two of them beyond a reasonable doubt and not the others.

1
2 You have to prove every one of them beyond a reasonable
3 doubt. What are these factors or elements that must be
4 proven beyond a reasonable doubt?

5 First you must find that a conspiracy existed
6 as is charged. You have to be satisfied beyond a reasonable
7 doubt that there was a conspiracy. You have to take that
8 whole record and you have to decide that issue. Was there
9 at the time or around the time charged a conspiracy?
10 That's Number 1 that must be proven beyond a reasonable
11 doubt.

12 Two, was this defendant on trial, and he is
13 the only one we are concerned with insofar as guilt or
14 innocence is concerned, was this defendant a knowing and
15 willing member of that conspiracy? The fact that a
16 conspiracy existed, if you don't find beyond a reasonable
17 doubt that he was a knowing member of that conspiracy,
18 then you can't hold anybody responsible. You have to prove
19 that this defendant was a member of that conspiracy, after
20 you have been satisfied beyond a reasonable doubt that
21 there was a conspiracy. That is the second element that
22 must be proven beyond a reasonable doubt.

23 Now we come to the third. That's all there are,
24 just three elements. Third, you must find that one of the
25 conspirators committed at least one of the overt acts set

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644

forth in the indictment at or about the time and place alleged. I'll come back to that later. Right now I am just saying to you there are these three elements: 1, proof beyond a reasonable doubt, says the law, that there was a conspiracy, of the nature charged; 2, that this defendant was a member of that conspiracy; and thirdly, that an act was committed in furtherance of the objectives of that conspiracy.

Now, I am going to give you a simple example. Try to remember it. It is a rough example. In fact, I concede it is a crude example but it will give you an inkling into this sometimes complicated and worrisome law with regard to conspiracy. If you will pay attention, you will get it. A man, we will call him A, says to another fellow that he knows, B, he says, "B, I have been planning to knock off that bank down the street." You know that is the language used for robbing. "I am going to knock it off." And B says, "When are you going to do it?"

A says, "I don't know." B says, "Listen, how about letting me in on that? I want to get in on it. What's wrong with me?"

A says, "Okay, you are in." They shake hands. You know how long that took? Thirty seconds. There is a plan to rob a bank and you have two people, and you have

1 to have at least two for a conspiracy. You can't conspire
2 with yourself. You have to have two. There you have A
3 and B, and they both agree to plan how to rob the bank.
4 And A is as much a member of that as B. So there you have
5 two elements already. You have a conspiracy, if you
6 believe it. Of course, this is all predicated on the fact-
7 finder's finding or believing first you have a conspiracy
8 or plan because they both plan or agree to plan to rob a
9 bank, and both were agreeable, knowing, willful members
10 of it. A didn't hit B over the head to get him to say can
11 I be a member. B volunteered and said that I want to be
12 a member. So you have two members of that conspiracy.
13

14 Then they say, "What time do you think it's
15 best to do it?"

16 "At nighttime," says A.

17 "Do you know what time they open?"

18 "No," says the other one. "I think it's
19 Thursday."

20 B, without telling it to A, calls the bank and
21 he says, "When are you open?" The answer is that it is
22 open in the evening. "What time?" 7:30 to 10.

23 He hangs up. It's an innocent telephone call
24 but he took a step in connection with that plan. He found
25 out that the evening hours were 7:30 to 10.

2 Now, if the fact-finders were to be satisfied
3 that those three elements existed and were satisfied
4 beyond a reasonable doubt, there you have a completed
5 conspiracy.

6 Now, suppose after they did that, they didn't
7 go through with it. Still if that can be proven beyond
8 a reasonable doubt, they are guilty of the crime of
9 conspiracy.

10 Suppose they actually went ahead and committed
11 the robbery? The second charge, committing the robbery.
12 First would be conspiracy and, secondly, would be the
13 robbery.

14 Does that rough example give you a glimmer,
15 at least some little entrance into the thinking on this
16 entire subject? Does that make sense to you, sir? Are
17 you able to follow it?

18 JUROR NO. 9: Yes.

19 THE COURT: How about you, Mr. Fox?

20 MR. FOX: Yes.

21 THE COURT: How about you, Ma'am?

22 JUROR NO. 6: Yes.

23 THE COURT: Do the lights bother you, because
24 you are wearing those sunglasses?

25 JUROR NO. 9: Yes.

1
2 THE COURT: I will have to repeat a lot of
3 this, but don't worry. I believe if you repeat, it will
4 sink in. I'm sure all of you have a pretty good idea of
5 what I am talking about, but I have to give it to you with
6 the fine language of the law, of which we are proud, and
7 I am going to give it to you in the Judge's way of talking
8 to people in order to sell an idea, in order to sell a
9 thought, in order to explain something and make it crystal
10 clear.

11 A conspiracy cannot exist without at least
12 two persons, whereas the separate crime to carry out the
13 object of the conspiracy can be violated of course by one
14 person. One person can rob the bank. Putting it more
15 simply, it is a crime to conspire or plan or agree to
16 commit a crime and it is another crime if the plan is
17 carried out.

18 See how I'm repeating myself? I want to keep
19 driving it home in all kinds of language, as long as I get
20 the thought home. Hence, you have Count 1, which charges
21 a conspiracy, and Count 2 which is commonly referred to as
22 the substantive count which is the act that is alleged to
23 have been committed by carrying out the objective of the
24 conspiracy.

25 Because of its importance to the maintenance

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648

of law and order an explanation of an unlawful conspiracy requires a word or two of background. Collective criminal agreement, that is, a partnership in crime, creates a greater potential threat to the public than the lone operator. Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish. Group association increases the likelihood that the criminal objective will be successfully realized and renders detection more difficult than the instance of a sole aggressor.

Just like any gigantic enterprise that spreads its tentacles underneath and above, it takes a great deal of time before you snap them all off. And it was because the association, the conspiratorial group can dig in by one doing one thing and another one doing another and each one furthering the objective of the conspiracy that the law says the moment you do that, Mister, you are guilty of a crime. Because it is human nature, and we laugh at the law, stupidly if we laugh at the law because the law is based on human behavior. They know if a group of people get together and start to plan, it is going to be tough to try to uproot it and expose it. And they know that once they get together, it is mighty hard to stop it, and a

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2 great number of criminal activities will be in progress
3 and bring about a **holocaust** to the community before the
4 whole thing has been broken up.

5 And that is the reason why getting together,
6 conspiring, arranging or planning to violate a Federal law,
7 that getting together alone, so to speak, is a crime. And
8 so it was because of these and other reasons that Congress
9 made a conspiracy, or concerted action to violate a
10 Federal law, a crime entirely separate, distinct and
11 different from the substantive law which may be the object
12 of the conspiracy.

13 In essence, then, it is a crime to conspire to
14 plan to violate a Federal law. I repeat, there is no need
15 here to prove an actual violation of another Federal law.
16 In other words, it is not necessary to show that the
17 conspiracy succeeded. Two or more persons may agree to
18 violate a Federal law. That alone constitutes, in essence,
19 the crime of conspiracy. If they actually violate the law
20 they conspire to do, that constitutes another separate
21 and distinct crime.

22 This is the more elegant language of the law,
23 but doesn't that tell you the same thing I was telling you
24 in simple language?

25 (All jurors nod in the affirmative.)

1
2 In order to find the defendant before you
3 guilty of the crime of conspiracy, the Government has the
4 burden of proving, as I have already emphasized, beyond a
5 reasonable doubt those three elements that I have already
6 mentioned, and they must prove every one of the three
7 beyond a reasonable doubt.

8 Let me give them to you again, three elements.

9 First, that the conspiracy alleged in the
10 indictment existed.

11 Second, that the defendant on trial was a
12 willing and knowing member of that conspiracy.

13 Three, that a step was taken to further or
14 carry out the objective of the conspiracy. Such as the
15 telephone call in the rough example I gave you.

16 A conspiracy is a combination, says the law in
17 another way but the same thought, a conspiracy is a combina-
18 tion or agreement of two or more persons by concerted
19 action to accomplish a criminal or unlawful purpose. The
20 gist of the crime is that unlawful agreement or combination
21 to violate the law. A conspiracy is sometimes called a
22 partnership in crime in which each member becomes the
23 agent of every other member. To establish a conspiracy,
24 the Government is not required to show that two or more
25 persons sat around a table and entered into a solemn pact

2 in writing and sworn to before a Notary Public. That's
3 stupid. You know human behavior doesn't operate that way.
4 Your common sense will tell you when men in fact undertake
5 to enter into a criminal conspiracy, much is left to the
6 unexpressed understanding. Conspirators do not actually
7 reduce their agreements to writing. From the very nature
8 of a conspiracy, it is almost invariably secret, in its
9 origin and in its execution.

10 The fewer the words, the better. They use
11 code numbers or names. It is sufficient if two or more
12 persons in any manner through any contrivance, impliedly
13 or tacitly come to a common understanding to violate the
14 law. Sometimes, as I gave you in the example of robbing
15 a bank, that requires only a few words. People must not
16 get the notion that the only time you got a contract or
17 an understanding or a meeting of minds is when you have a
18 long drawn-up agreement. Suppose you go into a grocery
19 store. You see this all the time. All you say is milk
20 and the grocer takes out a bottle, puts it right in front
21 of you, you give him some change and you walk out. That
22 is an agreement, an understanding, a meeting of minds. The
23 buyer wants to buy milk, the grocer wants to sell him the
24 milk at a price. That is all action. Hardly any words.
25 Milk, out comes the bottle, out comes the change, there is

2 a completed contract, as valid as the most complicated
3 contract between two giant corporations.

4 Why? Because there is a meeting of the minds.
5 Both agree on the same thing. One to buy, the other to
6 sell, for a consideration, the money that was put on the
7 counter to pay for it.

8 So you can see then that in a conspiracy more
9 than ever hardly any words are used. Actions speak louder
10 than words and that's what the law keeps on reminding us
11 with regard to conspiracy. Action, action, action.

12 Did the defendant walk up and down on that
13 corner? The Government's proof says yes. The defendant
14 denies it. If he walked up and down for ten, fifteen
15 minutes and you believe it, you might take that into
16 consideration to determine whether or not he was a part of
17 a conspiracy, if you so find. But it is for you to find.
18 That's the contest here. You remember the Government had
19 the defendant on the stand, did you not do this, did you
20 not do that, did you not do the other? The defendant said
21 no, no, no. There is the issue. Other proof says yes,
22 yes, yes.

23 That bag, that shopping bag, which was right
24 in the immediate vicinity of where the defendant sat. Was
25 it there, as the defendant said it was, because the driver

2 of the car didn't have any other place to put it? That's
3 reasonable. But did it happen that way? Action. What
4 was it doing there? Is that a smart defense or is it the
5 actual truth? Were the cops lying or were they telling
6 the truth? That's what you are here for. That's your job,
7 not mine. I just give you these offhand examples just to
8 emphasize the point. When I talk about action, I have to
9 give you a few examples of action. I am not telling you
10 which way I am impressed. If I want to tell you, as I
11 have already told you, I can tell you directly.

12 Was the defendant an innocent victim of an
13 otherwise simple endeavor? According to him, he didn't
14 know anything about this. And by "this" I mean actually
15 what was in that bag, Exhibit 1, the shopping bag. If the
16 proof does not show beyond a reasonable doubt, not beyond
17 all possible doubt but beyond a reasonable doubt, that
18 there was a conspiracy and that he was a member of it,
19 chuck it out, give him the verdict, let him go home. If,
20 on the other hand, you are satisfied beyond a reasonable
21 doubt, say so. Don't do anybody any favors.

22 And so thus dealing with the first element
23 which must be proven beyond a reasonable doubt, that is,
24 the existence of the alleged conspiracy, you are not to
25 dismember it and view its separate parts, but you are to

look at it as a whole. You are to consider all the evidence from start to finish, all the evidence which has been admitted with respect to the conduct, the acts, the declarations of each of the alleged parties and such inferences as may reasonably be drawn from those circumstances.

If on the basis of the sum total of such evidence and the reasonable inferences to be drawn from it, you are **convinced** that the minds of at least two alleged conspirators met in an understanding way, in an agreement to seek to achieve the unlawful purpose I have already pointed out to you, then this element of the offense is established.

In this connection, it is not necessary for the Government to prove the success of the conspiracy in order to establish a violation of the conspiracy statute. I repeat, persons may be guilty as parties to a conspiracy even though the objectives they undertook to achieve were never accomplished. Usually the only evidence available is that of disconnected acts. Remember I told you at the beginning, watch every act, every piece of testimony, every shred. So usually the only evidence available is that of disconnected acts on the part of the alleged conspirator, which acts, however, when taken together in connection with

2 each other, show a conspiracy or an agreement to secure a
3 particular result and show it as satisfactorily and as
4 conclusively as more direct proof.

5 Very seldom do you find direct proof. If you
6 find that the parties got together then to accomplish
7 something unlawful, then a conspiracy is shown even though
8 you may find the individual conspirators may have done
9 acts in furtherance of the common unlawful design apart
10 from and unknown to the others, so long as those acts were
11 done to carry out the same objective of the conspiracy.

12 Not everyone does the same job. The man on
13 top does one kind of job, the fellow next to him has a
14 different kind of function to perform. And the fellow at
15 the bottom who does the running of the errands in connec-
16 tion with that same conspiracy is equally guilty. The top
17 guy doesn't do the dirty work himself. Very seldom.
18 Others do one thing, still others do another. Others do
19 the most menial thing, but if they all knew what the
20 conspiracy was about, what its objective was, to rob a
21 bank, to sell drugs, to transport liquor, whatever it is,
22 if they knew that was the objective of getting together and
23 they all agreed to it and they all, in effect, said to
24 count me in and a single act was done to carry out the
25 objective of the conspiracy, each and every one of them,

1 the top captain and the lieutenant and the errand boy, the
2 fellow that runs the errands, are equally guilty.

3 What punishment they get is another matter.
4 We are talking about whether you are guilty or not guilty
5 of the crime. And you don't have to know what each one
6 did. Get that. It is extremely important. The man on
7 the top is not going to tell every little fellow there
8 what his plans are. As long as his plans are in connection
9 with that conspiracy, what he does is binding on the fellow
10 that runs the errands. So long as it is done in connection
11 with the common objective of the conspiracy.

12 Under certain circumstances even some members
13 of the conspiracy were unaware of it and had no reason to
14 suspect it, if in connection with carrying out the objec-
15 tives of a conspiracy a killing occurs, every one of them
16 can be held accountable. That is the law. Whether anyone
17 likes it or not.

18 And so if any conspirator commits an act in
19 furtherance of the objectives of the conspiracy at a time
20 when he was a member of that conspiracy, even though that
21 act was not known to the other co-conspirators, they are
22 bound by his act, so long as it was in connection with the
23 furtherance of that conspiracy.

24 Have I got that over to you?
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658

people alleged to have participated in the conspiracy.

That is the law. Because we know that there is no open expression. Very seldom is there.

And so, ladies and gentlemen, if you conclude that the conspiracy as charged existed, you must next decide whether this defendant on trial before us was a member of that conspiracy. That element, too, as I have pointed out already many times, must be established beyond a reasonable doubt as I have defined reasonable doubt for you.

In short, whether or not a defendant was a member of a conspiracy may be determined from the reasonable inferences. See how the law keeps on going back to reasonable inferences? That's not my law, ladies and gentlemen. That's created by the law of the statute. This is the construction of that statute by the Supreme Court of the United States. I'm just copying those words. I didn't create it. I'm not that smart. This is the law as defined by the Highest Court in the land.

In short, whether or not a defendant was a member of a conspiracy may be determined upon the reasonable inferences to be drawn from all the evidence in the case, including the evidence that you heard as to his own actions, his own conduct, his own connection with the acts and

conduct of the other alleged co-conspirators. Putting it more succinctly, the Government must prove that the defendant knowingly and willfully joined the conspiracy during the period of his operation with the intent and purpose of furthering its objectives.

I want to caution you that mere association with one or more conspirators does not make one a member of a conspiracy. Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient, without more, to establish that an accused was a participant in the conspiracy or aided and abetted the crime.

Likewise, mere presence at conspiratorial discussions and knowledge of the existence of the conspiracy are not sufficient by themselves, and without more, to establish that a defendant was a member of the conspiracy. In other words, if you sit in on something and you know full well that they are planning a conspiracy, you know about it but you don't make yourself a member of it, you can't be held accountable. But, if you make yourself a member of it and you join up with them, that's another proposition.

But the law wants to be sure that you don't hook somebody, so to speak, who hasn't become a member of

2 an unholy plan or an illegal enterprise.

3 What I am trying to emphasize then, in order
4 to convict, you must find from the total trial record that
5 this defendant, and find so beyond a reasonable doubt, was
6 a participant in the conspiracy and not merely a knowing
7 spectator. You must focus upon the defendant's relation-
8 ship to the crime and not solely upon his relationship
9 with others accused of committing the crime. His relation-
10 ship to the crime must be sufficiently substantial to
11 satisfy the concept of personal guilt.

12 What is necessary is that the defendant
13 participate with knowledge of at least some of the purposes
14 of the conspiracy. He doesn't have to know every detail.
15 You don't have to prove that every detail was known to
16 anybody connected with a conspiracy. If he knew the general
17 objectives, that's it. And all you have to prove then is
18 that the accused consented or was a part of that conspira-
19 torial enterprise even though he did not know the great
20 details, the many details, if there were, in connection
21 with a conspiracy. And even though he didn't know what
22 someone else did who was a conspirator in that same
23 conspiracy, and did it without his knowledge, he is still
24 bound by it as I have emphasized over and over again.

25 I know this is simple, I know this is repetitious

2 but I have to do it in order to feel satisfied in my own
3 mind. Now, that does not necessarily mean that he has to
4 do what we call spadework. He can get on the telephone,
5 make a couple of calls and he is as much a member of the
6 conspiracy as the fellow who is doing something every other
7 minute in connection with the furtherance of the conspiracy.
8 So long as the person accused, in making that telephone
9 call or whatever other simple thing he may have done, was
10 a member, a knowing member, a willing and knowing member
11 of that conspiracy.

12 A defendant may not know all of the conspirators.
13 This is repetitious. If he knows there is a conspiracy
14 and if he has knowledge of its basic common objectives
15 and aims and joins it, then he adopts as his own the past
16 and the future words and acts of all the other conspirators
17 in furtherance of the conspiracy, as he understands it.
18 Even though he may not have been present when the words
19 were said or the acts were done.

20 Just think of it. He is bound by even the
21 acts that were done before he became a member, provided
22 those acts were done in connection with the furtherance of
23 the objectives of the conspiracy. It is a perilous thing,
24 and the law tells you so, and that is the law's way of
25 trying to avert this entanglement which is the constant

fear of any civilized community.

A person becomes a member of a conspiracy by associating himself, however informal, with the common plan or scheme, knowing the central aim or principal purpose of the overall plan or scheme and intending to aid in some way, even a minor way, to bring about the success of a plan or scheme, and hence it comes about that you have the captains, lieutenants and the fellow on the lowest rung of the ladder. I don't think I need to expand upon that every time there is a conspiracy involving such personages, the captain doesn't call in the little fellow. I have told you all of that before. That is something I am not going to repeat.

The basic question, and I give you all approaches to conspiracy by different minds greater than mine. They all deal with the same subject matter but they say it a little differently. As long as it points to understanding, I am willing to go through with it. I give you my word that, if I am saying this correctly, I can do it. Take one-third of what I said to you and it would be correct and I wouldn't be called upon to do any more. I am doing this more, so to speak, because I want to feel in my own conscience that not a single person on this jury fails to understand what it's all about. We all have different

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brainpower. I'm not an Oliver Wendell Holmes or a Brandeis or a Cardozo, and I know it. I don't come up to their ankles. And so not everybody on this jury has the same IQ. That doesn't say that not everyone on this jury has nothing to contribute. You bet you have. Everyone. Some have seen more in life than any of you will ever see the rest of your lives. Some may be unable to explain or go into a dissertation with the queen's English but who have a knowledge of life and have a perfect right to say that you go to the books, I'll go to life. As some great author once said, "Books are a bloodless substitute for life." Remember those words. The more you live, you see how true that is. "Books are a bloodless substitute for life." That's the reason I didn't ask you a single question as to your formal education. I wanted to have a jury made up of people who had a knowledge of life, and I'm content we have such a jury.

Accordingly, to find this defendant before you guilty under the conspiracy count, you must find that he entered into a conspiracy with specific criminal intent and knowledge. The only way you have of answering or arriving at the state of mind of the defendant in the case before you is to take into consideration all of the facts and circumstances shown by the total evidence from beginning

to end. Direct proof, here again says the law the same thing, direct proof with regard to willful or wrongful intent or knowledge is not necessary. They may be inferred from acts or a combination of acts. These are questions of fact to be determined by all the circumstances -- by whom? By the Judge? No. By the lawyers? No. By you.

Some conspirators may play major roles, I already gave you that. Others may play small roles, may play minor roles, but they are all accountable under the law.

Am I getting through to you, Mr. Salkin?

MR. SALKIN: Yes, your Honor.

THE COURT: How about you, Mr. Horowitz?

MR. HOROWITZ: Yes, sir.

THE COURT: Does it make sense?

MR. HOROWITZ: Yes.

THE COURT: Mr. Garret?

MR. GARRET: Yes.

THE COURT: You are the man that got wounded with a bullet.

MR. GARRET: That's right.

THE COURT: I remember.

I'm looking over a lot of this stuff and I know I have repeated it over and over again. I am going

to save you the trouble of you listening to me pound away at the same thought.

In determining whether or not the defendant was a party to or a member of such a common plan, the jury is not to consider what others may have said or done; that is to say, the membership of the defendant in such a common plan must be established by evidence as to his own conduct. That is, what he himself knowingly said or did. If and when it appears from the evidence, direct or circumstantial, in the case that such a common plan did exist and that the defendant was one of the members of the plan, then the acts and statements by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the common plan for conspiracy and in furtherance of some intended object or purpose of the plan.

Now to sum it up. The Government must establish beyond a reasonable doubt that the defendant, aware of its purpose and object, entered into the conspiracy with a specific criminal intent; that is, that the defendant

1
2 knowingly was aware and participated in the conspiratorial
3 plan, purposely intending to violate the law. Should you
4 find beyond a reasonable doubt that a conspiracy existed
5 and that based on proof of its actual participation therein,
6 this defendant was a member, then, I repeat, that the acts
7 and declarations of any other person you may find was
8 also a member of the conspiracy made during its pendency
9 and in furtherance of its objectives are considered the
10 acts of all the current members even though they were not
11 present.

12 See how important that is for me to keep on
13 roping it in? Because later on I am going to tell you what
14 the law has to say about that gun, whether the defendant
15 owned it or didn't own it. Even if he didn't know of its
16 existence. I am going to point out to you that if that
17 gun, in essence, was a tool or used in connection with the
18 furtherance of the objectives of the conspiracy and the
19 jury so finds, and if the proof satisfies the jury beyond
20 a reasonable doubt that this defendant was a member of the
21 conspiracy, I intend to point out to you that the possession
22 of that gun in such a circumstance would be binding on
23 this defendant.

24 So get the proposition of law, that declarations,
25 the acts, and that means holding a gun or using a gun or

2 intending to use it, of any person who is a conspirator,
3 provided you have been satisfied beyond a reasonable doubt
4 that there was a conspiracy and provided you are satisfied
5 beyond a reasonable doubt that this defendant was a
6 member, and provided you are satisfied that that gun may
7 have been used or was there for a purpose in connection
8 with the furtherance of the objectives of the conspiracy,
9 just the way a weighing machine to weigh the drugs or a
10 cutting machine to cut is a part of the conspiracy under
11 certain circumstances, and so you may find with a gun or
12 any tool that you, the jury, believe to be a part of such
13 an enterprise might very well be binding on a person who
14 didn't even know of its existence.

15 Does that fit in with what I have been saying .
16 over and over again? It isn't just a few telephone calls
17 that somebody makes outside of the hearing of someone else.
18 It includes acts done by a co-conspirator unknown to
19 another co-conspirator during the existence of the con-
20 spiracy, however, and to further the objectives of the
21 conspiracy. Then they are all hooked by it. And I will
22 develop that later. But all of these are facts for you
23 to resolve. I have to tell you the law. I have to make
24 it clear. You can't dump the law. You do what you will
25 about the facts. That's your business.

2 Now we come to that third element. And you
3 will remember I told you the Government would have to prove
4 beyond a reasonable doubt not only that a conspiracy
5 existed, not only a defendant was a member thereof but an
6 act was done. You remember I gave you an example of that
7 robbing a bank and then somebody makes a telephone call
8 to find out what time the bank opened up in the evening.
9 That is an overt act. That's a step taken and that's what
10 the third element deals with.

11 Let me define it for you more exactly. The
12 offense of conspiracy is complete only when the unlawful
13 agreement is made and any single overt act to effect the
14 object of the conspiracy is thereafter committed by at
15 least one of the conspirators. What is this overt act? I
16 have already indicated to you it is any step or action or
17 conduct, even innocent on its face like a telephone call,
18 which is taken to achieve, accomplish or further the
19 objective of the conspiracy. The purpose of requiring
20 proof of one overt act, why does the law insist on it?
21 Simply put, because people can get together and plan to do
22 something and just do nothing about it. The law says you
23 don't get hooked if that's what you do, if that's all you
24 do. It looks as though you abandoned it, you didn't carry
25 it out. But when you take a step, that shows you meant

2 business. That shows you didn't intend to abandon it.
3 That shows that the plan of the conspiracy was determined
4 upon and a step taken to carry it out.

5 Doesn't that make sense? Take any business
6 deal. It's all right to talk with your future buyer, you
7 have everything fine, he thinks you are a great guy and he
8 is going to buy 50,000 of this and a hundred thousand of
9 something else, but not until you get a little initial on
10 a piece of paper. Then you know that he means business and
11 he is not just engaged in fancy talk. There again, the
12 law shows a knowledge of human behavior. So it says you
13 have to prove beyond a reasonable doubt that some step was
14 taken to further the objective of the conspiracy.

15 The overt act need be neither a criminal act
16 nor the very crime which is the object of the conspiracy.
17 It need not be committed by the defendant himself.

18 Now let me read you what the indictment says
19 as to overt acts. They are not very lengthy. All of them
20 are innocent on their face, as I remember.

21 "1) On or about December 8, 1975, Defendant
22 Prikas went to the vicinity of East 74 Street and Second
23 Avenue, New York, New York.

24 "2) On or about December 16, 1975, Defendant
25 Prikas went to 74th Street and Second Avenue."

In other words, he did it on December 8 and did it on the 16th.

"3) On or about December 16, 1975, Jaime Valdes went to the vicinity of East 74th Street and Second Avenue, New York, New York.

"4) On or about December 16, 1975, Defendant Cuadros went to the vicinity of East 74th Street and Second Avenue.

"5) On or about December 16, 1975, Defendant Jaime Valdes entered an automobile parked in the vicinity of East 74th Street and Second Avenue, New York, New York, in which automobile was present the Defendant Cuadros."

Those are the overt acts which are set forth in the indictment. And the reason I repeat them for you is to show you that they may be innocent on their face, as the telephone call in the crude example I gave you, and yet, they were done in order to further the objective of the conspiratorial plan.

The Government must under law allege some, but not all, of what it contends are the overt acts. Again it says, you see parties conspire and agree to do an unlawful thing and they may change their mind and not go through with it and drop it and pull out of it right away, and so the law says when you do an overt act, however, in further-

1 ance of it, that shows you were in it, you had not
2 abandoned it. You undertook to fulfill its object.

3 The prosecution under our law is not required
4 to set forth in the indictment each and every act on which
5 it relies to establish the conspiracy or the defendant's
6 participation therein, nor is it required to prove each
7 overt act which may have occurred during the furtherance
8 of the conspiracy. It is required to prove at least one
9 such act did take place.

10 The overt act or step essential to sustain a
11 conspiracy need not implicate all the conspirators nor is
12 it required that each of the conspirators participate in
13 or commit that particular overt act. It is sufficient
14 that such overt act was performed by any one or some of
15 the conspirators. This is so since the act of one con-
16 spirator, as I have already pointed out over and over again,
17 done in furtherance of the conspiracy becomes the act of
18 all the conspirators.

19 The guilt of a conspirator is not measured by
20 the extent or the duration of his participation in the
21 conspiracy nor is it necessary that he receive a pecuniary
22 benefit for his participation. That is the law. If the
23 defendant participated in the conspiracy to a more limited
24 degree than others or if he received less benefit than
25

others, he is equally culpable as long as he was in fact a conspirator, which is, I repeat, for the thousandth time, it seems, your mission to decide and no one else's.

As alleged in the indictment, the conspiracy commenced on or about October 16, 1975, and continued until August 26, 1976. It is the law that the Government need not prove that the conspiracy existed over the whole course of time which is alleged in the indictment. The duration of a conspiracy may be very short or it may be very long. It may last even for many years or during parts of each year. You must bear in mind that once formed, a particular conspiracy must retain throughout its existence the same basic agreement and the same objective present when the conspiracy started. It must be the same conspiracy, not some other conspiracy.

If you do not find such a single overall conspiracy, the Government will have failed to establish the single overall conspiracy as charged in Count 1. If you find that within that period, all the elements of this crime have been demonstrated to your satisfaction beyond a reasonable doubt, then that crime becomes complete.

Now we turn to Count 2. How does that read?

"On or about the 16th day of December 1975, in the Southern District of New York, Valdes, Prikas, Cuadros, the

2 Defendants, unlawfully, intentionally and knowingly did
3 distribute and possess with intent to distribute approxi-
4 mately one pound of cocaine." That is the essential of
5 the charge. Either they did distribute it or possessed it
6 or possessed it with intent to distribute it.

7 What does the Government have to prove to
8 sustain that charge? Remember I gave you the three elements
9 for conspiracy. Now I am going to give you the elements
10 that the law makes imperative in order to establish beyond
11 a reasonable doubt Count 2. What does the law say about
12 Count 2? You remember I read you the law on conspiracy.
13 Now let me read you the law on Count 2. "It shall be
14 unlawful for any person knowingly or intentionally to
15 distribute or possess with intent to distribute a con-
16 trolled substance." That means a substance like cocaine.
17 "Whoever aids, abets, counsels, commands, induces or
18 procures an offense against the United States is guilty of
19 an offense."

20 What does the Government have to prove to
21 establish Count 2 of this indictment? The Government must
22 prove beyond a reasonable doubt that on or about December 16,
23 1975, this defendant possessed with intent to distribute
24 a narcotic drug, meaning cocaine, including cocaine, or
25 aided and abetted another in the distribution of a narcotic

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drug, such as cocaine, or aided and abetted another in possessing such a substance with intent to distribute it.

Second, that he did so unlawfully, willfully and knowingly. That must be proven also beyond a reasonable doubt.

And, thirdly, this must be proven beyond a reasonable doubt, that the substance which the Government claims was distributed or was possessed with intent to distribute is, in fact, a narcotic drug controlled substance.

I will explain to you in just a minute or two what the law means by aiding and abetting. First let's go, however, to the first element of this second count. In order to convict this defendant of the second count, you must find that he aided and abetted another who distributed the narcotics or possessed the narcotics with intent to distribute. The legal definitions of these words, three words, possession, distribution and intent, must guide you in your consideration of this first element of the crime.

Possession, a person who knowingly has direct physical custody or control over a thing at a given time is then in actual possession of it.

Distribution. The word distribute means to deliver a controlled substance. The word deliver, in turn,

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675

2 is defined as the actual or attempted transfer of the drug.

3 The word intent refers to a person's state of
4 mind. I will comment further on intent in just a little
5 while.

6 In sum, the words distribute a controlled
7 substance mean to transfer or deliver such a substance,
8 and the phrase possessed with intent to distribute means
9 to have custody or control of an item with the state of
10 mind or purpose of transferring or delivering it.

11 Now, the second element, unlawfully, willfully
12 and knowingly, I will develop that in greater detail,
13 although on its face and from what I have already said, you
14 have more than just a bare idea of what those words mean.
15 Unlawfully, willfully and knowingly, and we will comment
16 on that a little more fully later when we come to the
17 whole subject, and I think we will do it right now.

18 Although these words almost define themselves,
19 nevertheless, they are set forth in the indictment so as
20 to make certain that no one will be convicted because of
21 mistake or inadvertence or other innocent reason. And so
22 by the use of these words, unlawfully, willfully and
23 knowingly, the Government must prove beyond a reasonable
24 doubt --

25 JUROR NO. 3: Could you speak a little

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676

2 louder, your Honor?

3 THE COURT: It's about time. I'm getting a
4 little weary of sitting. Thank you for telling me.

5 And so, by the use of these words, unlawfully,
6 willfully and knowingly, the Government must prove beyond
7 a reasonable doubt a specific intent to commit a crime
8 before there can be a conviction as to such a count in
9 the indictment. An act or failure to act is done knowingly,
10 is done voluntarily and purposely and not because of some
11 mistake or inadvertence or carelessness or other innocent
12 reason.

13 More precisely, what is meant by willfully,
14 in the eyes of the law, means doing an act knowingly and
15 purposely with bad intent. It means with specific intent
16 to disregard the law or to do which the law forbids. It
17 involves a conscious wrongdoing.

18 On the other hand, willfully does not mean
19 inadvertence, carelessness or honest misunderstanding of
20 what the law requires. And so carelessness, thoughtless-
21 ness, misunderstanding is not the equivalent to willfulness.
22 Willfulness involves the state of the person's mind, and
23 that is an issue of fact for you to resolve.

24 Medical science has not devised an instrument
25 which can record what was going on in a person's mind in

2 the distant past or what motivated that person. A state
3 of a person's mind may be inferred from words, from his
4 actions, from his conduct. Get that word, inferred,
5 inferred, inferred. Just as you knew when your son told
6 you that he hadn't gone near the refrigerator and he didn't
7 touch the jam pot, you know darn well and good he did
8 because there was just a little bit over here on the side.
9 He didn't wipe it all off.

10 And so the state of a person's mind may be
11 inferred from words, from actions, from conduct. It has
12 often been said that you will bring into the jury box with
13 you your common sense and the experience of your daily
14 lives in the marketplace, in your home, in dealing with
15 all kinds of people. You have tasted the bitter and the
16 sweet. I don't know the background life of a single one
17 of you, but I will say that I am impressed to the extent
18 that you are charged with a mission of showing who you are
19 and what you have done, what you have seen, what you have
20 tasted. Everyone of rational mind would have to conclude
21 that you have met many times the challenges of life.

22 One of the greatest judges that ever lived,
23 Mr. Justice Oliver Wendell Holmes of the Supreme Court,
24 told this very plainly, "That the law is not logic, it is
25 experience." And that is the reason we have a jury. We

1 don't want a bunch of magicians. We want people who have
2 grappled with life.

3
4 It is obviously impossible to ascertain or
5 prove directly what was the operation of the mind or the
6 intention of any defendant, but a wise and intelligent
7 consideration of all the facts and circumstances shown by
8 the evidence and the exhibits, the entire trial record in
9 this case, will enable you to come to the conclusion with
10 a reasonable degree of accuracy what were the intentions
11 of this defendant.

12 Intent involves a mental attitude with a
13 knowledge of a definite act and with a knowledge of sur-
14 rounding circumstances you may draw a definite and logical
15 conclusion. In your everyday affairs you are continuously
16 called upon to decide upon the actions of others what
17 their intentions are. You do it among your relatives, you
18 do it with your children, you do it with neighbors, you
19 do it with people that you are seeing for the first time.
20 You do it with salesmen whom you have never seen before.
21 You are able to determine, and to an astonishing degree,
22 whether what is coming out of the mouth or what you see are
23 the actions of other human beings, points to a certain
24 course of conduct or a knowledge or an intent. Now when
25 you look in the eyes of certain persons, you know without

their saying a word whether they knew what was going on.

So proof of the circumstances surrounding a man's actions can supply an adequate basis for a finding that a defendant acted knowingly and willfully. The actions of a man must be set in their time and place and just as the meaning of the word is understood only in its relation to other words in a sentence, so the meaning of a particular act may depend on the circumstances surrounding it.

Now, the third element that must be proven beyond a reasonable doubt is that the substance involved is a narcotic drug, to wit, cocaine. I don't think you would have much difficulty with that element because there has been a stipulation conceded that it is so.

You remember the stipulation avoided the calling of the chemist. I am glad to see you nod your heads. You are encouraging me very, very much.

In light of what I have repeated over and over again, some of the words I am about to use will become so natural to you and you will see how they fit into another framework. I am going to talk about aiding and abetting. It is not necessary for the Government to show that the defendant physically committed the crime himself. You will recall that I mentioned that the law said or provides that

1 a person who aids and abets another to commit an offense
2 is as guilty of that offense as if he had committed it
3 himself. Accordingly, you may find the defendant guilty
4 of the offense charged in Count 2 if you find beyond a
5 reasonable doubt that any of the others named in the
6 indictment, namely, Valdes or Prikas, committed the offense
7 and that the defendant Cuadros aided and abetted him.
8

9 To determine whether the defendant aided and
10 abetted the commission of an offense, you ask yourselves
11 these questions: Did he associate himself with the venture?
12 Did he participate in it as something he wished to bring
13 about? Did he seek by his action to make it succeed? If
14 he did, then he is an aider and abettor. In this connec-
15 tion, I instruct you that mere presence at the scene of a
16 narcotics transaction, together with knowledge that such
17 a transaction was occurring, will not suffice to render
18 a defendant guilty of aiding and abetting. In other words,
19 to convict a defendant in this case, you must be convinced
20 beyond a reasonable doubt that he was doing something to
21 forward the crime, that he was a participant rather than
22 a knowing spectator.

23 Of course here, you know, it is clear the
24 defendant denies anything, any knowledge of a conspiracy.
25 He knew nothing whatever. That is his sworn testimony. He

doesn't even concede he was a spectator. He says that I am telling you the truth. That is for you to resolve.

So the law provides that anyone who knowingly aids or abets another in any manner in the commission of a crime is equally guilty of the commission in that crime and is himself a principal and may be charged directly with the commission of a crime as principal and convicted upon such charge, although the evidence indicates that he only aided and abetted in the commission of a crime and did not have a major part in the undertaking. He aids and abets if, knowing a crime is being committed, what he does helps make possible or causes the commission of the crime. And that harks back to what I told you in general in another connection, a conspiracy, and the least important character in the conspiratorial enterprise is equally guilty.

Now, we have done pretty much the heart of the charge and we now come to some other very important propositions of law but which will not be involved.

What do we mean by circumstantial evidence? Well, I can give you a long talk on that and I don't intend to because it isn't necessary. It's very simple. I'm looking at you right now. I see you with my eyes. That's direct evidence. Suppose before you came out here I

1 turned to the Clerk and I said, "Is the jury back from
2 dinner?" And he said, "Yes." That would be circumstantial
3 evidence that you had returned. I didn't see you with my
4 eyes but under the circumstances I would have a right to
5 conclude that every one of these jurors was back.
6

7 Take another example. You are sitting here in
8 this room, an old example judges have used for decades.
9 You came in and the sun was shining, let's assume, bright
10 as can be and you look forward to a nice walk in the after-
11 noon. Lo and behold, the morning session is hardly over
12 when in comes somebody in that door and he is just flooded
13 with water, it's dripping from him and he sits down and
14 there is a puddle right at his feet. You didn't see the
15 rain. If you saw the rain with your own eyes, that would
16 be direct evidence. But when you see what I have tried
17 to describe, that is circumstantial evidence that it's been
18 raining since you came in court.

19 That's all there is to this business of
20 circumstantial evidence. And in the eyes of the law, it is
21 equally as weighty as direct evidence. That word circum-
22 stantial evidence has been abused by the common conception.
23 They say circumstantial evidence, that means unless you
24 actually tasted it with your own mouth or you looked at the
25 person or saw it through a microscope or something, it

can't be. The examples I give you show that circumstantial evidence can be as impressive and as convincing as direct evidence.

Now, let me give you the law's language and I'll be through with this. It is rare indeed, as I have said before, that there is direct evidence as to the element of knowledge. Knowledge is generally shown by circumstantial evidence. Direct evidence then is testimony as to what a witness saw, heard or observed, what he knows of his own knowledge. Circumstantial evidence, on the other hand, rests on an inference. Proof is given of facts, like the umbrella, the wet clothing and one infers therefrom what reasonably follows in the common experience of mankind.

I point out to you that circumstantial evidence under the law, if believed, is of no less value than direct evidence. There is no requirement that proof of a crime and a defendant's guilt be based on both types of evidence. The only requirement is that such proof, whether entirely circumstantial or whether entirely direct or whether a part of each, that such proof be established beyond a reasonable doubt.

Now we come to another topic that I must charge you with, adoptive admissions. What do we mean by that?

1 Prikas testified that when Valdes and Cuadros pulled up
2 in the car beside his car at 48th Street and Queens Boule-
3 vard, he rolled down his window and asked Valdes what Cuadros
4 was doing on the scene. Valdes replied that Cuadros was
5 present for protection. Cuadros said nothing, according
6 to Prikas' testimony.
7

8 In addition to the instructions I have already
9 given you with respect to the statements of the co-conspira-
10 tor made in furtherance of the conspiracy, I charge you
11 that an out-of-court statement found to have been made by
12 another in the presence of a defendant and not denied by
13 the defendant may be found to have been adopted by the
14 defendant by reason of his silence. It is your task to
15 evaluate the statement in question and give it such weight
16 as you believe it deserves in light of all the circum-
17 stances which were brought out on the evidence.

18 Among the factors which you may wish to con-
19 sider is the likelihood that the defendant heard and under-
20 stood the statement in question, whether or not the state-
21 ment was made by someone with apparent knowledge of its
22 subject matter and whether the setting was conducive to
23 the expression of a dissent, if one was contemplated. In
24 essence, when one is silent under circumstances, such that
25 a dissent would by ordinary experience have been expressed

1 if the communication had not been correct, you may find
2 that the defendant adopted the statement in question as
3 his own.
4

5 Now there again, you being the fact-finders
6 will have to decide whether under those particular circum-
7 stances, even considering everything that Prikas testified
8 to, et cetera, et cetera, as to who was in the other car,
9 what was said, you have to evaluate that to decide whether
10 or not there was the equivalent on the defendant's part of
11 what I have just defined as an adoptive admission.

12 Now I want to talk to you a bit about the gun,
13 Exhibit 7. Agent Gray testified that he found a revolver
14 in the console of the vehicle in which Valdes and Cuadros
15 were riding at the time of their arrest. He identified 7,
16 a clear plastic envelope containing a revolver and a
17 number of bullets, as containing the revolver and bullets
18 which he seized. The gun, Exhibit 7, was then admitted
19 into evidence. I wish to instruct you now as to the pur-
20 poses for which Exhibit 7 may be used in your deliberations.

21 You may consider that exhibit first for the
22 purpose of assessing the credibility of the testimony given
23 by Prikas that Valdes said to him in the presence of
24 Cuadros that Cuadros was accompanying Valdes to provide
25 protection. If you find that such a statement was made,

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you may further consider that exhibit as one of the surrounding circumstances in determining what weight to give Valdes' statement in your deliberations.

There has also been evidence, particularly testimony by Gray, that he found certain documents bearing Cuadros' name in a gray case which you remember was marked 6, and the papers 6-A and 6-B, and that they were found, said Gray, in the console of Valdes' car, the same place where the revolver, or Exhibit 7 was found. Testimony by Gray concerning the location of the console from which you may infer that the console was accessible from either of the front seats of the car. And testimony by Gray that the defendant Cuadros was riding in the front passenger seat of that car when arrested, from which you may, but need not, infer that Exhibit 7 belonged to Cuadros or that he was in possession of it.

If you find that the weapon belonged to Cuadros, you may consider that fact as circumstantial evidence of Cuadros' participation in the conspiracy charged in the indictment, Count 1, and of his aiding and abetting Valdes and Prikas in the offense of possessing cocaine with intent to distribute as alleged in Count 2.

Remember, this defendant is not charged with illegally possessing a gun. That's not before you. There

2 is no such charge. The point we emphasize with regard to
3 the gun is merely in connection with the allegation by the
4 Government that Cuadros was a part of that conspiracy and
5 that he actually was in possession of a gun in order to
6 further the objectives of the conspiracy. That goes to
7 his participation in the conspiracy, his belief. It goes
8 to the conspiracy itself. That's the purpose of it.

9 If you think that the detectives or agents,
10 rather, were mistaken or lied or perjured themselves, out.
11 That's the end of that. If you believe the defendant's
12 version with regard to the gun and to 6, out. That's where
13 you come in. That's where your responsibility is enormous.

14 Now, suppose there wasn't a single bit of
15 evidence about protection. Consider it didn't take place.
16 But nevertheless the gun was there and all the rest of the
17 testimony is exactly the way it was, except there is
18 nothing before us, let's assume, with regard to protection.
19 Could that gun be used against Cuadros? Yes. And you
20 have already guessed how, because I have indicated it
21 already. If there was the conspiracy, and you so find
22 beyond a reasonable doubt, and you find that he was a
23 member of that conspiracy and you find or conclude that the
24 gun, that particular gun under those circumstances was a
25 tool or a part of the operation of such an enterprise, an

1
2 illegal enterprise to possess and distribute drugs; if you
3 conclude that that was such a tool, as much a tool as a
4 hunk of cash would be to pay off or to buy the raw materials,
5 or for this or for that, if the jury concludes that a hunk
6 of money was a part of the operational scheme or weapon or
7 tool or something to further the objectives, just like a
8 flashlight is in a burglar's hands or gloves to avoid
9 detection in the opening of a safe is considered a tool,
10 or a particular type of glassine envelope, even though it
11 is unfilled and empty but it's there at the premises, can
12 be declared by the jury to be a tool or a part of that
13 plan, a tool in connection with the participation or the
14 furtherance of that conspiracy. If you should so find
15 under all the facts and circumstances with regard to this
16 gun, then the fact even that the defendant did not know of
17 its existence; if it was, as you should so find, a tool
18 used in the conspiracy by another co-conspirator in that
19 same conspiracy, the defendant is responsible as much as
20 the one who actually used or possessed it.

21 Have I made that crystal clear?

22 (The jury indicates in the affirmative.)

23 THE COURT: You nod your head. You will be
24 surprised how I can turn on you and ask you some questions
25 and if you let me down, I am going to resign.

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JUN 3 1977
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